



EUROPEAN COMMISSION
Directorate General Internal Market and Services

Director General

Brussels,
MARKT/G2/PSDM/bh (2013) 3663122

Mr Steven Maijoor
Chairman
European Securities and Markets
Authority ESMA
Rue de Grenelle 103
75345 Paris
France

Dear Mr Maijoor,

On 7 August 2013, ESMA sent the Commission draft implementing technical standards amending Implementing Regulation (EU) No 1247/2012. The amendment concerns a postponement of the starting date for the reporting of exchange traded derivatives until 1 January 2015.

I would like to inform you of the European Commission's intention to reject the draft implementing technical standard submitted by ESMA.

Implementing Regulation No 1247/2012¹ was published in the *Official Journal of the European Union* on 21 December 2012 and entered into force on 10 January 2013. It was based on an implementing empowerment provided in Article 9(6) of Regulation (EU) No 648/2012² whereby the European Securities Markets Supervisory Authority (ESMA) was to develop draft implementing technical standards specifying *inter alia* the date by which derivative contracts were to be reported, including any phase-in for contracts entered into before the reporting obligation applied.

On 27 September 2012, those draft implementing technical standards pursuant to Article 9(6) of Regulation (EU) No 648/2012 were submitted by ESMA to the Commission together with draft regulatory technical standards pursuant to Article 9(5) of that Regulation. On 19 December 2012, the Commission endorsed without amendments those draft implementing and regulatory technical standards submitted by ESMA.

¹ Commission Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories under Regulation (EU) No 648/2012, OJ L 352, 21.12.2012, p. 20.

² Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201, 27.07.2012, p. 1.

As no trade repository was registered with ESMA by the dates specified in Article 5 of Implementing Regulation No 1247/2012, derivative contracts are to be reported 90 days after the registration of a trade repository for the relevant derivative class pursuant to Article 55 of Regulation (EU) No 648/2012. ESMA is currently in the process of registering trade repositories and the reporting obligation is expected to start in the Union in the first quarter of 2014 for all asset classes.

For the purpose of the reporting obligation, Regulation (EU) No 648/2012 does not differentiate between derivatives by trading methods. Although the regulatory and implementing empowerments provided respectively in Article 9(5) and (6) of that Regulation allow for differentiating between different classes of derivatives, following ESMA's draft regulatory and implementing technical standards, Implementing Regulation (EU) No 1247/2012 and Delegated Regulation (EU) No 148/2013 also do not differentiate between derivatives by trading methods for the purpose of the reporting obligation under Regulation (EU) No 648/2012. In particular, according to Implementing Regulation No 1247/2012, all data sent to trade repositories pursuant to the reporting obligation should follow the same rules, standards and formats for all trade repositories, all counterparties and all types of derivatives.

The starting date for reporting and the details to be reported pursuant to Article 9 of Regulation (EU) No 648/2012 are, therefore, identical for both OTC and exchange traded derivatives. This approach stems from the absence of evidence on the need to differentiate between derivatives by trading methods for the purpose of the reporting obligation under that Regulation when ESMA conducted its public consultations in accordance with Article 15(1) of Regulation (EU) No 1095/2010.

ESMA's amendment to the Commission draft implementing technical standards amending Implementing Regulation (EU) No 1247/2012 concerns a postponement of the starting date for the reporting of exchange traded derivatives until 1 January 2015. In particular, ESMA notes in its final report submitted to the Commission that, when finalising its draft implementing technical standards pursuant to Article 9(6) of Regulation (EU) No 648/2012, it did not consider differences between trading methods, notably between exchange traded derivatives and OTC derivatives. However, following further submissions provided to ESMA about the complexity of reporting of exchange traded derivatives after the entry into force of Regulation (EU) No 648/2012, ESMA now considers that the reporting start date for exchange traded derivatives should be postponed until 1 January 2015 in order for it to develop guidelines and recommendations to ensure a common, uniform and consistent application of Article 9 of Regulation (EU) No 648/2012. In particular the following aspects are deemed relevant: a clear identification of the counterparties of exchange traded derivatives, a consistent application of reporting requirements under Regulation (EU) No 648/2012 and Directive 2004/39/EC³ to the extent possible, and the compatibility of the models, logic and formats used to identify all of the details to be reported as provided for in those two legislative acts. ESMA considers that the proposed amendment is necessary in order to ensure a uniform application of the reporting obligation at Union level, which should allow competent authorities to use the information reported to trade repositories in a useful way for the exercise of their duties.

³ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, (OJ L 145, 30.4.2004, p.1).

The Commission notes ESMA's concerns regarding the application of the reporting obligation under Regulation (EU) No 648/2012 to exchange traded derivatives. The Commission considers however that those concerns do not justify the proposed delay in the implementation of the reporting of exchange traded derivatives to trade repositories under that Regulation.

The main objective of the reporting obligation for all derivatives in Regulation (EU) No 648/2012 is to allow for a comprehensive overview of the derivatives market and to enable the identification, monitoring and assessment of systemic risk. In order to attain this objective, Regulation (EU) No 648/2012 provides for the details of derivative contracts, both OTC and exchange traded derivatives, to be reported to trade repositories so that information on the risks inherent in derivatives markets are centrally stored and easily accessible to the relevant authorities. The necessity of a prompt implementation of the reporting obligation is evidenced by the fact that the starting dates of the reporting obligation are set to be applicable after 3 months from the registration of a trade repository. This timeframe is thus the period of time considered appropriate for the reporting obligation to be effectively applied.

The Commission is of the opinion that postponing the starting date of the reporting obligation for exchange traded derivatives would hinder the achievement of a key objective of Regulation (EU) No 648/2012, that is, the identification, monitoring, assessment and mitigation of systemic risk arising from derivative contracts by almost one year, and therefore runs counter the principle of ensuring the stability of the financial system and the functioning of the internal market for financial services as reflected in the Union financial legislation.

As regards the need for clarification on the identification of the counterparties of exchange traded derivatives, the Commission notes that the reporting of exchange traded derivatives presents different features compared to the reporting of OTC derivatives. The conclusion of an exchange traded derivative transaction involves a chain of contracts between different intermediaries that become counterparties to these contracts which nevertheless are part of the same derivative transaction. According to Regulation (EU) No 648/2012, any counterparty, regardless of whether it is a financial or a non-financial counterparty, to a contract in this chain is subject to the reporting obligation. It follows that there is no ambiguity in the Regulation as to the addressees of the reporting obligation and that market participants are not exposed to legal uncertainty regarding their legal obligations. The specific features of exchange traded derivatives do not prevent the identification of the counterparties to each of these contracts or an adequate implementation of the reporting obligation. Moreover, an agreement among these counterparties to delegate the reporting of these contracts to a single intermediary in the chain or even to a third-party is allowed under Regulation (EU) No 648/2012, facilitating the streamlining of the reporting process.

The consequence of several counterparties intervening in the same derivative transaction results in reporting the common data of that transaction more than once. This multiple reporting of common data does not amount however to duplication as referred to in Article 9 of Regulation (EU) No 648/2012 since the counterparty data of every contract must also be reported and this data is different in each report.

In addition, these reports are identified by the trade identifier that must be generated for each derivative contract in order to enable trade repositories to aggregate and compare data across different trade repositories, pursuant to Article 4 of Delegated Regulation

(EU) No 151/2013 supplementing Regulation (EU) No 648/2012⁴. In this respect, trade repositories must also ensure that the data they receive can be reconciled between trade repositories if counterparties report to different trade repositories, pursuant to Article 19 of Delegated Regulation (EU) No 150/2013 supplementing Regulation (EU) No 648/2012⁵. Consequently, further guidance on possible arrangements to report to trade repositories where derivative transactions involve several counterparties does not appear indispensable for the effective application of the reporting obligation and should not prejudice the contribution of the reporting obligation to the financial stability objective pursued by enabling competent authorities to have a comprehensive overview of the systemic risk posed by derivative markets through the timely reception by trade repositories of data of all derivative contracts.

Regarding ESMA's concern about the costs for market participants in terms of resources devoted to reporting systems and the need to put in place compatible models and formats for reporting under Regulation (EU) No 648/2012 and Directive 2004/39/EC, as well as the need to achieve consistency, to the extent possible, between the reporting obligation under both regimes, the Commission notes that the purpose, the details and the addressees of the reporting obligation under Regulation (EU) No 648/2012 and under Directive 2004/39/EC are different. Those differences, however, had already been taken into account when ESMA prepared the draft regulatory technical standards regarding reporting, as required by Regulation (EU) No 648/2012. Any significant improvement of the consistency between the reporting obligations under Regulation (EU) No 648/2012 and under Directive 2004/39/EC is therefore unlikely to be achieved through the guidelines and recommendations whose preparation is motivating ESMA's amending proposal.

The purpose of the reporting obligation under Directive 2004/39/EC is to ensure that investment firms act honestly, fairly and professionally and in a manner which promotes the integrity of the market, whereas the reporting obligation under Regulation (EU) No 648/2012 aims at monitoring, assessing and reducing systemic risk arising from derivatives. Due to their different purposes, the information to be reported to competent authorities under Directive 2004/39/EC does not mirror the information to be reported to trade repositories under Regulation (EU) No 648/2012, the latter being more detailed in nature and including aggregated data from both OTC and exchanged traded derivatives. The purpose of the reporting obligation under Regulation (EU) No 648/2012 is ultimately to store centrally and in an accessible manner information on derivative contracts to permit an assessment of systemic risk and the adoption of any necessary measures for its mitigation or reduction in a comprehensive manner, without any need to reconcile or complement that information with the information reported pursuant to other pieces of legislation.

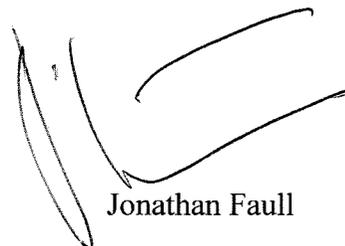
⁴ Commission Delegated Regulation (EU) No 151/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories, with regard to regulatory technical standards specifying the data to be published and made available to trade repositories and operational standards for aggregating, comparing and accessing the data, OJ L 52, 23.02.2013, p. 33.

⁵ Commission Delegated Regulation (EU) No 150/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories with regard to regulatory technical standards specifying the details of the application for registration as a trade repository, OJ L 52, 23.02.2013, p. 25.

According to Directive 2004/39/EC, investment firms which execute transactions in financial instruments admitted to trading on a regulated market must report the details of such transactions to the competent authority, an obligation that investment firms fulfil under the different national procedures that each Member State has put in place for that purpose. On the contrary, Regulation (EU) No 648/2012 imposes an obligation on all counterparties to report to trade repositories the details of all derivative contracts under a uniform procedure, allowing for that information to be centrally stored in those trade repositories so the different national and Union competent authorities concerned, including foreign authorities, can access the information reported for the assessment of systemic risk and the adoption of the related necessary measures. The regulatory objective of the reporting obligation is thus ensured by the use of a uniform procedure, model and format in all Member States, which enables relevant authorities to fully and effectively use the information they access from trade repositories for the exercise of their duties. Therefore, since the addressees and purposes of the reports under Regulation (EU) No 648/2012 and Directive 2004/39/EC are different, the existence of differences between their respective reporting procedures, one addressed to national competent authorities for supervising market participants behaviour, and another addressed to trade repositories for systemic risk purposes, as well as the inherent costs market participant might face as a consequence, are considered justified and do not appear to be an obstacle to the correct application of both reporting obligations.

I therefore inform you that the Commission, acting in accordance with the procedure set out in the fourth and fifth subparagraphs of Article 15(1) of Regulation (EU) No 1095/2010, intends to reject the draft implementing technical standard submitted by ESMA to amend Implementing Regulation (EU) No 1247/2012.

Yours sincerely,



Jonathan Faull